

**HAWAII ADMINISTRATIVE RULES
(CHAPTER 10, TITLE 12)**

SUBCHAPTER 1

GENERAL PROVISIONS

§12-10-1 Definitions. As used in this chapter:

"Able to resume work" means an industrially injured worker's injury has stabilized after a period of recovery and the worker is capable of performing work in an occupation for which the worker has received previous training or for which the worker had demonstrated aptitude.

"Appellate board" shall be as defined in section 386-1, HRS.

"Adjuster" means an individual, partnership, corporation, or others, who is in the business of adjusting workers' compensation insurance claims for a self-insured employer, insurer, or others.

"Attending physician" means a physician, as defined in section 386-1, who is primarily responsible for the treatment and direction of care of a work injury. There shall not be more than one attending physician. In the event an injured employee is treated by more than one physician in accordance with section 12-15-40, the employee shall designate a physician as the attending physician.

"Compensation" shall be as defined in section 386-1, HRS.

"Covered employment" shall be as defined in section 386-1, HRS.

"Days" means calendar days, unless otherwise provided.

"Department" shall be as defined in section 386-1, HRS.

"Director" shall be as defined in section 386-1, HRS.

"Disability" shall be as defined in section 386-1, HRS.

"Disciplinary action" means any action taken in good faith by the employer relating to or used for discipline. Disciplinary action shall include the actual sanction imposed upon an injured employee for the purpose of discipline, as well as any action taken in good faith by an employer that is a part of the disciplinary process, even if no sanction or punishment is ultimately imposed. Examples of disciplinary actions include, but are not limited to, where the employer takes good faith corrective or punitive action:

- (1) to produce a specific type or pattern of behavior;
- (2) to obtain conformity;
- (3) to train or correct;
- (4) to impose order on or improve work habits; and
- (5) to impose order on or improve the worksite.

If a collective bargaining agreement or other employment agreement specifies a different standard than good faith for disciplinary actions, the standards specified in the agreement shall apply.

"Disqualified health care provider" means a health care provider barred under section 386-27, HRS, from providing health care services to a person who has suffered a work injury.

"Employee" shall be as defined in section 386-1, HRS.

"Employee in comparable employment" shall be as defined in section 386-1, HRS.

"Employee's designated representative", for the purpose of section 386-31(b)(1), HRS, means the representative of record of the employee, such as the employee's attorney or union representative. As used in this chapter, employee shall include the employee's representative unless clearly indicated otherwise.

"Employer", as defined in section 386-1, HRS, includes a self-insured employer or the self-insured employer's adjuster or designated representative unless clearly indicated otherwise, the insurer of an employer, or an employer who has failed to comply with section 386-121, HRS.

Employer's designated representative", for the purpose of section 386-31(b)(1), HRS, shall include:

- (1) A self-insured employer's adjuster or attorney of record;
- (2) An insured employer's insurer, adjuster, or attorney of record; or
- (3) The adjuster or attorney of record of an uninsured employer.

"Employment" shall be as defined in section 386-1, HRS.

"Employment for personal, family, or household purposes" includes but is not limited to:

- (1) Services performed by an individual in constructing, repairing, or maintaining employer's private place of abode or dwelling.
- (2) Domestic, valet, custodial, or babysitting services performed by an individual for an employer in or about a private place of abode.
- (3) Chauffeuring or personal safeguarding services performed by an individual for an employer or members of the employer's family.

"Full-time student" means an individual who is considered a regular full-time student by the educational institution at which the individual is enrolled or registered.

"Good Cause" means a compelling reason for failing to perform an act required by law, unless otherwise provided. The party must prove that the failure to perform any act required by law was not due to willful neglect. A finding for good cause will be based upon the circumstances in each case.

"Hanai child" means a child who, prior to the industrial injury, is taken permanently to reside, be educated, and reared by someone other than the natural parents, traditionally a grandparent or other relative.

"Health care provider" shall be as defined in section 386-1, HRS.

"Higher wages" means a higher regular rate of pay per unit of time.

"Insured employer" means an employer who obtains workers' compensation insurance from an insurer pursuant to section 386-121(a)(1), HRS.

"Insurer" means any insurance company authorized by the insurance commissioner to underwrite, sell, or transact workers' compensation insurance in the State of Hawaii.

"Medical care", "medical services", or "medical supplies" shall be as defined in section 386-1, HRS.

"Medical stabilization" means that no further improvement in the injured employee's work-related condition can reasonably be expected from curative health care or the passage of time. Medical stabilization is also deemed to have occurred when the injured employee refuses to undergo further diagnostic tests or treatment which the health care provider believes will greatly aid in the employee's recovery.

"Personal injury" shall be as defined in section 386-1, HRS.

"Physician" shall be as defined in section 386-1, HRS.

"Self-insured employer" means an employer authorized by the director to comply with chapter 386, HRS, pursuant to section 386-121(a)(2) or (3), HRS.

"Sixty-six and two-thirds per cent", as required by sections 386-31 and 386-32, HRS, means the factor .6667.

"State average weekly wage" shall be as defined in section 386-1, HRS.

"This statute" or "the statute" means chapter 386, HRS, unless otherwise specified.

"Total disability" shall be as defined in section 386-1, HRS.

"Trade, business, occupation, or profession" shall be as defined in section 386-1, HRS.

"Uninsured employer" means an employer who has failed to comply with section 386-121, HRS.

"Wages" shall be as defined in section 386-1, HRS.

"Week" or "workweek" means a fixed and regularly recurring period of seven consecutive days.

"Work injury" shall be as defined in section 386-1, HRS. [Eff: 4/30/81; am 12/17/82; am 11/29/85; am 5/13/05] (Auth: HRS §§386-27, 386-72) (Imp: HRS §§386-1, 386-2, 386-3, 386-21, 386-24, 386-25, 386-27, 386-31, 386-32, 386-42, 386-43, 386-51, 386-71, 386-91, 386-121)

§12-10-2 Negotiation for benefit coverage. (a) The collective bargaining agreement shall not deny workers' compensation benefits to any employee who would be eligible for workers' compensation benefits under chapter 386, HRS.

(b) The collective bargaining agreement shall not diminish the entitlement of an employee to compensation payments for benefits such as temporary total or partial disability, permanent total or partial disability, vocational rehabilitation, death benefits, funeral and burial benefits, benefit adjustments, or medical treatment fully paid by the employer.

(c) Provision for medical care and services and treatment plan and medical fee schedule requirements prescribed under sections 386-21 and 386-26, HRS, and related Hawaii administrative rules may be collectively bargained provided that reasonably needed medical care, services, and supplies, as the nature of the injury requires, are provided.

(d) Notwithstanding the medical fees provided by chapter 386 and related Hawaii administrative rules, fees for medical services may be collectively bargained.

(e) The special compensation fund established under section 386-151, HRS, and employers not a party to the collective bargaining agreements are not bound by provisions of the agreement. Disagreements involving the special compensation fund and employers not a party to the collective bargaining agreement will be resolved according to provisions under chapter 386, HRS.

(f) Employers, groups of employers, and appropriate bargaining units with approved collective bargaining agreements may be required to provide the director with data to assess the effectiveness and efficiency of such agreements. This data may include:

- (1) Number of employees covered by the agreements;
- (2) Number of claims filed;
- (3) Average cost per claim;
- (4) Names of injured employees subject to collective bargaining agreements; and
- (5) Other pertinent information.

(g) Every employer, group of employers, or bargaining unit proposing to establish any program permitted under section 386-3.5, HRS, shall submit to the director at least ninety calendar days prior to the effective date of the collective bargaining agreement:

- (1) A certified executed copy of the agreement signed and notarized by all parties;
- (2) A listing of all employers subject to provisions of this agreement;
- (3) Number of employees covered by the agreement; and
- (4) Other pertinent information.

(h) Additions or deletions of employers subject to the collective bargaining agreement shall be filed with the director at least ten calendar days prior to the effective date of the addition or deletion.

(i) Any modifications to the approved collective bargaining agreement must be filed with the director for approval at least ninety calendar days prior to the effective date of the modification.

(j) The employer, group of employers, or bargaining unit shall notify the director in writing within ninety calendar days of intent to terminate the approved collective bargaining agreement. The employer, group of employers, or bargaining unit shall notify all employees covered under the collective bargaining agreement of the effective date of termination. The employer, group of employers, or bargaining unit shall also notify all employees with claims pending further action that their claims will be subject to the requirements of chapter 386, HRS, unless otherwise provided in the collective bargaining agreement.

(k) No compromise in regard to a claim for compensation covered by an approved collective bargaining agreement shall be valid unless it is approved by decision of the director as conforming to chapter 386, HRS, and made a part of the decision. [Eff: 11/22/97] (Auth: HRS §386-72) (Imp: HRS §386-3.5)

§§12-10-3 to 12-10-20 (Reserved)

SUBCHAPTER 2

COMPENSATION

§12-10-21 Disabilities. (a) Impairment rating guides issued by the American Medical Association, American Academy of Orthopedic Surgeons, and any other such guides which the director deems appropriate and proper may be used as a reference or guide in measuring a disability.

(b) If an employee is unable to complete a regular daily work shift on account of a work injury, the employee shall be deemed totally disabled for work for that day. [Eff: 4/30/81] (Auth: HRS §386-72) (Imp: HRS §§386-31, 386-32, 386-33, 386-34)

§12-10-22 Annual proof of dependency. Alien dependents not residing in the United States at the time of the injury or leaving the United States subsequently shall furnish the liable employer annually with a verified document certifying the continuance of dependency on a form prescribed by the director. [Eff: 4/30/81] (Auth: HRS §386-72) (Imp: HRS §386-42)

§12-10-23 Computation of average weekly wages. Except as otherwise provided by section 386-51, HRS, an injured employee's average weekly wage shall be computed as follows:

- (1) If the employee is employed on an hourly basis and has no overtime or other earnings during the one-year period prior to the work injury, the hourly rate shall be multiplied by the number of hours worked in a workweek;
- (2) If the employee is employed solely on the basis of a predetermined and fixed monthly salary and has no overtime or other earnings during the one-year period prior to the work injury, the monthly salary shall be multiplied by twelve and the product divided by fifty-two;
- (3) If an employee is employed solely on the basis of a predetermined and fixed semi-monthly salary and has no overtime or other earnings during the one-year period prior to the work injury, the semi-monthly salary shall be multiplied by twenty-four and the product divided by fifty-two;
- (4) If the employee is employed on the basis of:
 - (A) A predetermined and fixed monthly, semi-monthly, or weekly salary and in addition receives other wages such as, but not limited to, commissions, gratuities (tips), bonuses, overtime pay, hourly or daily pay; or
 - (B) Incentive earnings only (i.e. commissions, piecework pay); or
 - (C) An hourly or daily rate and in addition receives other wages such as, but not limited to, commissions, gratuities (tips), bonuses or overtime pay; the employee's total earnings for the twelve months preceding the work injury shall be divided by fifty-two; provided that if the employee at the time of the injury was employed at higher wages than any other period of the preceding twelve months and had earned overtime pay during the twelve-month period, the average weekly overtime hours obtained by dividing the total overtime hours worked during the twelve-month period by fifty-two shall be multiplied by the overtime hourly rate based on the higher wages, and the product shall be added to the weekly straight time pay obtained by multiplying the straight time hourly rate based on

the higher wages by the total number of straight time hours normally worked by the employee in a workweek.

- (5) If the employee is under twenty-five years of age and sustains a work injury causing permanent disability or death and:
- (A) If employed in an occupation or job classification as an apprentice or trainee under the terms of an apprenticeship or on-the-job training program, the average weekly wages shall be calculated on the basis of the rate of pay to be received at age twenty-five under the apprenticeship or trainee agreement, plan, or contract. An apprenticeship or on-the-job training program is one which is registered with the department, expressed in writing in a collective bargaining agreement or an employment contract, or one which the director determines bears substantial similarities to that of an on-the-job or career training program based on a mutual employer-employee understanding; or
 - (B) Is employed in an occupation or job classification and is not an apprentice or trainee, the average weekly wage shall be determined on the basis of the median rate of pay of the lowest and highest rate of pay of twenty-five year old employees employed in a similar occupation in employment by the worker's employer. If there are no twenty-five year old employees in a similar occupation with the same employer, the median rate of pay shall be determined on the basis of twenty-five year old employees in a similar occupation in employment with another employer in this State. [Eff: 4/30/81]
(Auth: HRS §386-72) (Imp: HRS §386-51)

§12-10-24 Credit for voluntary payments. For the purpose of section 386-52(a), HRS, an employer may, with the approval of the director, deduct from an amount payable as compensation any advance payments made to the injured employee if the employee had been notified in writing at the time the advance was made that the payments were in lieu of compensation. [Eff: 4/30/81]
(Auth: HRS §386-72) (Imp: HRS §386-52)

§12-10-25 Travel reimbursement. An employee who is required to obtain medical treatment shall use public conveyances whenever possible and shall be entitled to travel reimbursement. If the employee is unable to use public conveyances because of a physical condition, the nature of the injury, or geographical location, travel reimbursement by the most direct route shall be allowed. When such visits are made before or after work, or during working hours, only the excess miles outside of the normal route shall be allowed. Reimbursement for mileage shall be in accordance with Hawaii state government standards. [Eff: 4/30/81] (Auth: HRS §386-72) (Imp: HRS §386-21)

§12-10-26 Filing of notice of intent to terminate temporary total disability benefits. Written notice of intent to terminate payment of weekly temporary total disability benefits shall be sent by regular mail to the director and the employee in every case where the employer has determined that the employee is "able to resume work". In the event the employee has returned to work, a notice need not be mailed and temporary total disability payments may be automatically stopped as of the date prior to the return-to-work day. [Eff: 4/30/81; am 11/29/85] (Auth: §386-72) (Imp: HRS §386-31)

§12-10-27 Benefit rate adjustment for permanently and totally disabled worker. (a) Pursuant to section 386-35, HRS, insurers and self-insured employers shall make benefit rate adjustments to workers who are permanently

and totally disabled. Insurers and self-insured employers shall be entitled to reimbursement from the special compensation fund for the supplemental amounts paid.

(b) Claim for reimbursement shall be submitted on a form prescribed by the director. The reimbursement request shall include claimant's name, social security number, date of accident, age, case number, weekly compensation rate, and the amount of adjustment paid to the claimant.

(c) The request for reimbursement shall be submitted to the department annually by January 31 of the subsequent calendar year. The request shall be audited by the department and the appropriate sum paid to the insurer or self-insured employer by June 30 of the year the request was filed. Reimbursement requests received after January 31 may be paid by the department upon showing of good cause for the late filing. [Eff: 4/30/81; am 12/8/94] (Auth: HRS §386-72) (Imp: HRS §386-35)

§12-10-28 Subsequent injuries which would increase disabilities under section 386-33, HRS. (a) Within sixty days after medical care is prescribed and refused, or when curative medical care and rehabilitation is exhausted, and it is not likely the employee will be further rehabilitated or restored to preinjury status, the employee shall be deemed to have reached maximum medical stabilization. The extent of medical impairment preexisting the work injury, shall be assessed by a physician pursuant to section 12-10-21(a). The director shall convene a hearing to determine the temporary total disability period, the extent of permanent disability, and the responsibilities of the employer and the special compensation fund.

(b) In determining an employer's liability of one hundred four weeks of disability pursuant to section 386-33(a)(1) and (2), HRS, the employer shall receive no credit for compensation paid to an employee during periods of temporary total disability. The employer shall receive credit for all compensation paid to an employee on account of permanent partial disability resulting from the injury as against the liability of one hundred four weeks of permanent partial or permanent total disability.

(c) In determining an employer's liability of one hundred four weeks of disability pursuant to section 386-33(a)(3), HRS, the employer shall receive no credit for compensation paid to an employee on account of temporary total, temporary partial, permanent partial, or permanent total disability.

(d) The product of one hundred four or thirty-two multiplied by the employee's weekly benefit rate pursuant to section 386-31(a), HRS, on the date of injury shall be used to determine credit for one hundred four or thirty-two weeks for disabilities covered by section 386-32(a) HRS.

(e) The product of thirty-two multiplied by the employee's weekly benefit rate pursuant to section 386-31(a), HRS, on the date of injury shall be used to determine credit for thirty-two weeks for death benefits covered by sections 386-41 through 386-43, HRS. The product of one hundred four multiplied by the dependents' weekly benefit rate pursuant to sections 386-41 and 386-43, HRS, shall be used to determine credit for one hundred four weeks for death benefits covered by sections 386-41 through 386-43, HRS.

(f) In the case of part-time employment, credit for thirty-two and one hundred four weeks shall be calculated as if the employee had been a full-time employee in accordance with section 386-51, HRS.

(g) In computing the offset for the amount awarded by a prior compensable injury under section 386-33(a)(1), HRS, the employer is responsible for documenting the amount awarded for the prior compensable injury. In cases involving the special compensation fund, the entire permanent partial disability award will first be offset by the amount awarded for the prior compensable injury. The employer will then be liable for one

hundred four weeks and the special compensation fund will be liable for the balance.

(h) The special compensation fund shall not be liable for compensation if the subsequent injury is so severe that it alone would have caused permanent total disability or death. [Eff:12/17/82; am 2/11/91; am 11/22/97] (Auth: HRS §386-72) (Imp: HRS §§386-31, 386-32, 386-33, 386-41, 386-42, 386-43, 386-51)

§12-10-29 Payments from the special compensation fund. The special compensation fund shall be responsible for temporary total disability and medical benefits where provided by statute and when ordered by the director. [Eff: 12/14/82; am 12/8/94] (Auth: HRS §386-72) (Imp: HRS §§386-21, 386-23.5, 386-31, 386-32, 386-51.5, 386-56)

§12-10-30 Documentation of claims. (a) If an employer denies compensability of a claim and the employee disagrees, the employee shall file form WC-5 which shall be provided to the employee by the department. The WC-5 shall authorize the release of medical documents pertaining to or having a bearing on the injury.

(b) If an employer fails to file form WC-1 and the employee wishes to pursue a claim, the employee shall file form WC-5 which shall be provided by the department.

(c) If a dependent of a deceased claimant wishes to pursue a claim, the dependent shall file form WC-5a, which shall be provided by the department. The WC-5a shall authorize the release of medical documents pertaining to or having a bearing on the injury.

(d) Any request for reopening of any claim pursuant to section 386-89(c), HRS, shall be accompanied by medical information or any other substantial evidence showing a change in or of a mistake in a determination of fact related to the physical condition of the injured employee. [Eff: 12/17/82; am 12/8/94] (Auth: HRS §§386-71, 386-72, 386-82) (Imp: HRS §§386-21, 386-81, 386-89)

§12-10-31 Liability of third person. (a) Should any action be filed, arbitration commenced, or claim be made to recover damages pursuant to section 386-8, HRS, the party or parties in interest shall within ten calendar days notify the director in writing and all other parties of interest with pertinent details as the action, arbitration, or claim continues.

(b) The party or parties of interest shall obtain written consent of both employer and employee and file with the director within thirty calendar days of execution a final copy of the claim-dispositive document, release, settlement, court order, waiver, dismissal, arbitration award, or judgment.

(c) The director may hold a hearing at the director's discretion or on application of a party of interest to determine whether or not the employer has an obligation to make further compensation payments including reimbursements and credits against sums recovered from any third party. [Eff: 12/17/82; am 11/29/85; am 12/8/94] (Auth: HRS §386-72) (Imp: HRS §386-8)

§12-10-32 Commutation of benefits. (a) Pursuant to section 386-54, HRS, the director shall require the employee or the dependents of the employee to file a request for commutation and present evidence to support such request.

(b) The employer, upon written notification of approval of commutation of payments, shall pay those benefits forthwith unless the employer can prove undue hardship. Undue hardship requests shall be filed with the director within ten calendar days after mailing of the commutation request with supporting documents.

(c) Commutation shall not be approved from benefits due from the special compensation fund or benefits due from a permanent total disability award. [Eff: 12/17/82] (Auth: HRS §§386-54, 386-72) (Imp: HRS §386-54)

§12-10-33 Special compensation fund; notification of pre-existing disabilities. (a) In any case, including death, where an employer believes that section 386-33, HRS, applies, the employer shall give the director written notice no later than thirty calendar days after the date of the initial rating report indicating evidence of pre-existing disability. The notice shall state the reasons underlying the employer's belief that section 386-33, HRS, applies and shall include a copy of the rating report or the final decision of the director or the appellate board indicating evidence of the pre-existing disability. Upon good cause shown, the director may permit the employer to file the written notice after the expiration of the time period. Failure to file a notice in accordance with this section shall subject the employer to liability for all benefits.

(b) If the employer files a notice without proper documentation or evidence supporting the applicability of section 386-33, HRS, the director may order the employer to reimburse the special compensation fund for cost and fees which the fund may incur during the proceedings of the injury.

(c) Any employer who accepts all liability for benefits due an injured employee should pre-existing disability combined with the injury result in a greater disability need not file a notice.

(d) Benefits due an injured employee pursuant to section 386-33, HRS, shall be paid by the employer or the special compensation fund, or both.

[Eff: 11/29/85; am 2/11/91; am 12/8/94] (Auth: HRS §386-72) (Imp: HRS §386-33)

§12-10-34 Controverted case payments. When only the question of liable employer in an industrial injury is to be settled and temporary disability benefits remain unpaid, the last employer shall pay seventy-five per cent of the weekly benefits. The payments shall be made without a decision of the director. When a liability determination is made, the liable employer, if not the last employer, shall reimburse the last employer. [Eff: 11/29/85] (Auth: HRS 386-72) (Imp: HRS §386-31)

§§12-10-35 to 12-10-60 (Reserved)

SUBCHAPTER 3

ADMINISTRATION

§12-10-61 Filing of report. (a) All reports required to be filed pursuant to chapter 386, HRS, and this chapter shall be filed at the office of the disability compensation division, department of labor and industrial relations, Honolulu, Hawaii, except that reports of injuries occurring in all political subdivisions, except the city and county of Honolulu, shall be filed at the district office of the department in the county in which the injury occurred.

(b) Any report or form provided by the director and required to be filed at the Honolulu office of the disability compensation division shall be the original; and any such report or form required to be filed at the district offices of the department shall be the original and one legible copy.

(c) All reports or forms required to be filed pursuant to chapter 386, HRS; and this chapter shall be written in ink or typewritten and shall be signed in ink. The signature of the person signing the report or form constitutes a certification that the person has read the report or form and that, to the best of the individual's knowledge, information, and belief, all information contained in the report or form is true.

(d) Notwithstanding subsections (b) and (c), the director may approve electronic submission of reports. The electronic submission of reports shall be accompanied by a certification that the information contained in the electronic submission is true and accurate.

(e) In computing any period of time prescribed by chapter 386, HRS, and this chapter, the day of the act, event, or default, after which the designated period of time is to run, shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal holiday in the State, in which event this period shall run until the next day which is neither a Saturday, Sunday, nor a holiday. A half-holiday shall be considered as other days and not a holiday. [Eff: 4/30/81; am 11/8/99]
(Auth: HRS §386-72) (Imp: HRS §§386-95, 386-96)

§12-10-62 Public records. (a) The term "public records" as used in this chapter is defined as in section 92-1, HRS, and shall include all rules, regulations, written statements of policy or interpretation formulated, adopted, or used by the director regarding the administration and application of chapter 386, HRS, all industrial injury case files, all final opinions, decisions and orders, and any other material on file in the office of the disability compensation division unless accorded confidential treatment pursuant to statute, administrative rule, or determined by the director to be in the best interest and welfare of a claimant.

(b) All public records shall be available for inspection in the office of the disability compensation division and the department's district offices during established office hours.

(c) Public records printed or reproduced by the director in quantity shall be given to any person requesting same and paying the cost thereof. Photocopies of public records shall be made and given to any person upon request and upon payment of the cost thereof, and certified copies of extracts from public records shall also be given upon request and upon payment of the cost thereof.

(d) Requests for public information, for permission to inspect official records, or for copies of public records shall be made in writing to

the director. The requests shall be handled with due regard for the dispatch of other public duties. [Eff: 4/30/81] (Auth: HRS §386-72) (Imp: HRS §91-2)

§12-10-63 Application for reopening of cases. (a) An application for reopening of a case pursuant to section 386-89, HRS, shall be in writing, shall state specifically the grounds upon which the application is based, and shall be served upon each party at the time of filing with the director.

(b) Whenever an application for reopening of a case is made, the director shall review the case file and may, by discretion, hear the interested parties. The director shall deny or grant a reopening and notify the parties in writing. [Eff: 4/30/81] (Auth: HRS §386-72) (Imp: HRS §386-89)

§12-10-64 Correction of records. In the absence of an appeal, clerical mistakes in a decision or order and errors arising from oversight or omission may be corrected by the director at any time or on the application of any party and after notice to each party in a case. [Eff: 4/30/81] (Auth: HRS §386-72) (Imp: HRS §91-2)

§12-10-65 Discovery. Discovery in workers' compensation cases before the Director is limited to:

(a) **Interrogatories and requests for production of documents.** One set of written interrogatories and requests for production of documents may be served upon each adverse party. The number of interrogatories, including the requests for production of documents, to any one party shall not exceed 20, each of which shall consist of a single question or request. The responses to the interrogatories and production of documents shall be served on all parties within 20 days of mailing of the interrogatories and requests. The responses to interrogatories and the requests for production of documents may not be submitted to the director later than 15 days prior to hearing.

(b) **Depositions.** For the purpose of obtaining any matter, not privileged, which is relevant to the subject matter involved in the pending action, the director may, upon application, order the taking of relevant testimony by deposition upon oral examination. Permission to take a deposition of a party will be granted only when it is reasonable and necessary such as when there is a specific showing of the following:

- (1) That a party who has been served with written interrogatories or requests for production of documents and has failed to respond to the interrogatories or production of documents; or
- (2) That the responses to the written set of interrogatories are insufficient; or
- (3) All parties agree to the taking of a deposition.

(c) **Subpoenas.**

- (1) Subpoenas requiring the attendance of witnesses at a hearing before a hearings officer or for the taking of a deposition or the production of documentary evidence from any place within the State at any designated place of hearing may be issued by the director or a duly authorized representative. The employer shall serve the injured employee with a copy of a medical record subpoena unless the employer has previously obtained the employee's authorization to examine the employee's medical records. Should the employee subpoena medical records, the employer shall be served with a copy of the medical record subpoena.
- (2) The party subpoenaing the records shall serve these records within fifteen calendar days of their receipt upon all other parties. These records shall be submitted by the party

requesting the subpoena to the director fifteen days before the date of the hearing or upon request by the director.

(3) A party who desires to enforce the director's subpoena shall seek enforcement from a court of competent jurisdiction.

(d) **Witness fees.** A subpoenaed witness shall be entitled to the same witness fee as in the case of a witness subpoenaed to testify before the circuit court.

(e) **Duty to Supplement.** Each party is under a continuing duty to timely supplement or amend responses to discovery up to the date of the hearing.

(f) **Failure to Comply with Discovery.** If any party fails to comply with this rule and any action governed by it, the director may impose sanctions not to exceed \$250.00 for each offense or preclude the party from presenting such evidence at the hearing.

(g) **Additional Discovery.** Upon agreement of the parties or upon showing that discovery is reasonable and necessary, the director may allow additional discovery, may limit discovery, or may modify the time limits set forth in this rule. [Eff: 4/30/81; am 2/11/91; am 5/13/05] (Auth: HRS §386-72) (Imp: HRS §§91-2(2), 386-86)

§12-10-66 Alternative resolution. (a) In lieu of a hearing before the Director, at anytime after a claim for compensation is made and before the director renders a decision, the parties may agree in writing to have any controversy arising under this chapter be decided by a referee paid for by the parties.

(b) **Appointment of referee.** Before a referee can conduct a hearing, the parties shall submit the agreed upon referee's name to the Director for appointment to serve as a referee. The referee shall be a neutral person. An individual who has a known, direct, and material interest in the outcome of the controversy or a known, existing, and substantial relationship with a party may not serve as a referee, unless that interest is disclosed, and any conflict is waived by the parties.

(c) **Costs.** Unless the parties otherwise agree, the costs and fees of the alternative resolution process shall be divided equally between the parties.

(d) **Stay of proceedings before the director.** If the parties agree to have any controversy referred to a referee, the director shall stay all actions or proceedings until the director issues a decision based on the referee's recommended decision.

(e) **Discovery and other matters.** Chapter 386 and its rules remain applicable to proceedings before the referee except that requests shall be directed to and recommended decisions shall be made by the referee instead of the director.

(f) **Referee's recommended decision.** The referee shall issue and submit the referee's recommended decision to the Director no later than sixty days after the hearing, and shall deliver the recommended decision to all parties personally or by registered or certified mail.

(g) **Approval of recommended decision.** The Director shall review the referee's recommended decision to determine whether the recommended decision is in compliance with chapter 386. If the recommended decision is in compliance with chapter 386, the Director shall approve the recommended decision and upon the director's approval, the recommended decision has the same force and effect as a director's decision rendered under chapter 386, and it may be enforced as if it had been rendered in an action before the director. If the recommended decision does not comply with chapter 386, the Director may modify or vacate the recommended decision. If the director

vacates the recommended decision, the parties may resubmit the controversy to the referee.

(h) **Appeals.** Except when the parties have agreed that no appeal may be taken and where the director has not modified or vacated the referee's recommended decision, the parties may appeal the director's decision in accordance with section 386-87.

(i) **Applicable law.** Chapter 386 and Hawaii Administrative Rules title 12, chapters 10, 14, and 15 are applicable to the proceedings before the referee.

(j) **Mediation.** At anytime after a claim for compensation is made and before the director renders a decision, the parties may agree to resolve any controversy regarding this chapter through mediation by a mediator agreed upon by the parties. Unless otherwise provided in the agreement, the costs and fees of mediation shall be divided equally between the parties. Upon the successful conclusion of the mediation, the parties shall submit the settlement agreement to the director for approval. If any controversy remains unresolved after the mediation, the parties may request the director resolve the controversy after providing the parties the opportunity to be heard in accordance with chapter 386. [Eff: 4/30/81; am 2/11/91; am 5/13/05] (Auth: HRS §386-72) (Imp: HRS §§91-2(2), 386-86)

§12-10-67 Repealed. [Eff: 4/30/81; R 5/13/05]

§12-10-68 Posting and furnishing of information. (a) Each employer shall post and maintain in places readily accessible to employees a printed statement, "Notice to Employees", issued by the director.

(b) Every employer shall furnish within three working days of notice of the injury to each injured employee a copy of the brochure, "Highlights of the Hawaii Workers' Compensation Law", issued by the director. [Eff: 4/30/81; am 12/8/94] (Auth: HRS §386-72) (Imp: HRS §386-99)

§12-10-69 Attorney's fees. (a) Within ten calendar days following the filing of a final decision and order or upon the filing of a stipulation and settlement agreement, attorneys seeking approval of fees and costs claims pursuant to section 386-94, HRS, shall file with the department a request for approval of attorney's fees and costs setting forth a detailed breakdown of the time expended and costs incurred in each activity up to and including the date of the decision. The request shall be served on those parties against which the fees and costs claims are to be assessed. Any party objecting to approval of a request may file written objections no later than ten calendar days after service. Absent objections, agreement shall be presumed. No request for approval of attorney's fees and costs claims or agreement to pay attorney's fees and costs claims shall be valid until approved by the director. The director may require additional details and justification of time billed or costs claims. The director shall disapprove requests which are not served properly or filed timely, except for good cause.

(b) The director shall determine the maximum allowable hourly rate of the attorney and reasonable time allowable on each workers' compensation case. In approving attorney's fee requests, the director will consider the approved hourly rate of the attorney and the number of hours approved. Factors to be considered in determining an attorney's approved hourly rate include the number of years practicing as an attorney, the number of cases representing workers' compensation claimants during the last three years, and any other pertinent factors that should be considered in determining the hourly rate. Factors considered in determining the number of hours allowable include the time and effort required by the complexity of the case, novelty and difficulty of issues, benefits obtained for the injured employee, and

arguments made by the attorney and injured employee. The director reserves the right to adjust the hourly rate and the number of hours requested.

(c) Costs claims such as delivery, typing, telephone (except for long distance calls), fax, and parking are considered part of the cost of doing business and shall not normally be approved unless properly justified. Claims such as photocopying and long distance telephone calls may be approved as costs if properly justified. [Eff: 12/17/82; am 2/11/91; am 5/13/05] (Auth: HRS §386-72) (Imp: HRS §386-94)

§12-10-70 Penalties and fines. All penalties and fines authorized by chapter 386 may be assessed by the director. The assessments shall be paid into the special compensation fund established under section 386-151, HRS. [Eff: 12/17/82] (Auth: HRS §386-72) (Imp: HRS §§386-31, 386-94, 386-95, 386-96, 386-97.5, 386-98, 386-123, 386-129, 386-151)

§12-10-71 Annotation of documents. All documents, correspondence, or other material filed with the director shall include as part of the heading:

- (1) The injured employee's full name;
- (2) Department's case number;
- (3) Date of accident;
- (4) Name of the employer in whose employ the injury occurred; and
- (5) If applicable, the name of the insurer or adjuster.

[Eff: 11/29/85] (Auth: HRS §386-72) (Imp: HRS §§386-95, 386-96)

§12-10-72 Hearing notices. (a) All hearing notices shall be mailed to the last known address on record of the injured employee and the employer or the insurer or the adjuster of the employer. All parties shall notify the department in writing of any address changes within two weeks of the change. Hearing notices shall also be mailed to the employee's or employer's designated representative provided a letter of representation is on file with the department. Requests for hearing notices by other parties of interest shall be in writing, and approved by the injured employee, employer, or director for each injury.

(b) Should the injured employee or employee's representative, or the employer or employer's representative fail to appear at the hearing, the director may issue a decision based on the information on file. The decision shall be final unless appealed pursuant to section 386-87, HRS. [Eff: 11/29/85] (Auth: HRS §386-72) (Imp: HRS §386-86)

§12-10-72.1 Hearings Process.

(a) **Hearings.**

- (1) **Requests for hearing.** If the parties are unable to resolve a claim, dispute, or controversy arising under chapter 386, HRS, or these rules, and have been unable to resolve the contested issue informally through mediation or alternative resolution if the parties agreed to submit the matter to mediation or alternative resolution, a party may request a hearing before a hearings officer appointed by the director by filing a written application with the director on a prescribed form. The form shall contain:
 - (A) A statement of the issue(s) to be determined at the hearing;
 - (B) A statement setting forth the names and addresses of all witnesses to be presented at the hearing, and/or whose testimony will be submitted by way of a deposition transcript;
 - (C) A statement notifying the adverse party of their right to file a response to the application within 20 days of the application.

The application for hearing shall be mailed by certified mail by the requesting party to all parties. A certificate of mailing shall be filed with the application. If an attorney has entered an appearance for a party, mailing to the attorney is mandatory. An application will not be accepted for filing unless it contains all information required by this rule and will be returned for corrections.

- (2) **Response to Application for Hearing.** Within 20 days from the receipt of the application for hearing, the adverse party shall file its response to the application on a prescribed form with the director and shall send a copy to all parties.
- (3) **Scheduling of Hearing.** A hearing shall be held within 60 days after the response is filed with the director or after the date the response is due. If at least 20 days have passed since the application has been filed, and no response has been filed, the claimant may request an expedited hearing upon a showing that without an expedited hearing to determine the merits of the dispute, the claimant will suffer severe economic hardship or severe physical or mental harm.
- (4) **Place of Hearing.** All cases within the scope of these rules will be heard in the county where the disputed work injury occurred, unless other arrangements are agreed upon between the parties. The use of electronic hearings utilizing teleconference shall also be authorized if agreed upon by all parties.
- (5) **Evidence at hearing.** The admissibility of evidence at the hearing shall not be governed by the rules of evidence, and all relevant oral and documentary evidence shall be admitted. Irrelevant, immaterial, or unduly repetitious material shall not be admitted into evidence. The hearings officer shall give effect to the privileges recognized by law. Documentary evidence may be received in the form of copies, provided that, upon request, all other parties to the proceeding shall be given an opportunity to compare the copy with the original. If the original is not available, a copy may still be admissible, but the unavailability of the original and the reasons therefore shall be considered by the hearings officer when considering the weight of the documentary evidence. The hearings officer may take notice of judicially recognizable facts and of generally recognized technical or scientific facts. The director shall notify the parties whenever possible before the hearing of the material to be so noticed and the parties shall be afforded an opportunity at the hearing to contest the facts so noticed.
- (6) **Witness at Hearing.** A party may not add a witness or an issue after the filing of the application or response except upon agreement of all parties, approval of the hearings officer, or for good cause shown. A party may not produce a witness at a hearing who has not been listed in the application or response or added by agreement or order, except to present rebuttal testimony or upon approval of the hearings officer for good cause shown.
- (7) **Continuance of Hearing.** At any time following the scheduling of the hearing, any party may, by written motion, seek an extension of time to commence a hearing upon good cause shown. For the purpose of this paragraph, good cause includes, but is not limited to, the following:
 - (A) Death or incapacitation of a party or an attorney for a party;

- (B) Entry or substitution of an attorney for a party a reasonable time prior to the hearing, if the entry or substitution reasonably requires an extension;
- (C) Failure of a witness to appear when the witness is under a valid subpoena, which will result in prejudicing one of the parties;
- (D) A showing that more time is clearly necessary to complete authorized discovery or other necessary preparation for the hearing; or
- (E) Agreement of the parties that a settlement has been reached, or that settlement negotiations are ongoing and likely to be reached.

Absent additional grounds, failure of the party to timely or adequately prepare for the hearing does not constitute good cause.

- (8) **Submission of reports, other documentary evidence, depositions, position statements for formal hearing.** All reports without limitation including medical and hospital reports, physicians' reports, vocational reports, and records of the employer shall be filed with the director and sent to all parties at least 15 days prior to the hearing. If not so disclosed, the reports shall not be introduced into evidence at the hearing, absent a showing of good cause. Reports and records previously provided to opposing parties do not have to be provided again. When provided, such reports and records do not have to be identified as potential hearing exhibits. A deposition transcript shall be filed 15 days before the hearing. Oral arguments at the conclusion of the hearing may be allowed at the discretion of the hearings officer. A party may file a position statement and/or proposed order upon approval of the hearings officer. Only reports and records filed and identified at the hearing which are relevant to an issue set for hearing will be considered as evidence. Testimony presented by reports, records, deposition, or teleconference is presumed to be equivalent of in person hearing testimony.

- (9) **Hearing Electronically Recorded.** For quality assurances, every hearing shall be electronically recorded. Any party in the action may request a recorded copy of the hearing. The cost of the recorded copy of the hearing is five dollars, payable to the department.

(b) **Powers of the hearings officer in conducting hearing.** The hearings officer shall have, in addition to powers as are conferred by law, the powers in conducting a hearing without limitation:

- (1) To hold hearings and issue notices;
- (2) To administer oaths and affirmations;
- (3) To consolidate hearings or sever proceedings, provided that those actions shall be conducive to the ends of justice and shall not unduly delay the proceedings or hinder, harass, or prejudice any party;
- (4) To allow and supervise discovery as deemed reasonable and necessary;
- (5) To subpoena and examine witnesses;
- (6) To receive relevant evidence, and to exclude evidence which is irrelevant, immaterial, repetitious, or cumulative, and accordingly may restrict lines of questioning or testimony;
- (7) To regulate the course and conduct of the hearing;

- (8) To regulate the manner of any examination so as to prevent the needless and unreasonable harassment or intimidation of any witness or party at the hearing;
- (9) To remove disruptive individuals, including any party, legal counsel, witness, or observer;
- (10) To hold conferences, including prehearing conferences, before or during the hearing for the settlement or simplification of issues; and
- (11) With the exception of scheduling or other purely administrative matters, a hearings officer presiding over the matter shall not initiate any oral communication with a party or counsel for a party unless prior written consent of all other parties or their counsel has been obtained.

(c) **Burden of Proof.** With the exception of those controverted cases that fall under section 386-85, HRS, where the burden of proof lies with the employer, the burden of proof for all other controverted cases shall lie with the party filing for hearing.

(d) **Decision on the record.** If the director determines that there is no material fact in dispute as to any contested issue, the director may elect to render a decision on the record. When the director determines that a decision on the record is appropriate, the parties shall be given 20 days to submit written statements and evidence. Ten additional days shall be given to respond. At the discretion of the director, additional time may be allowed for good cause. Copies of all written statements and evidence shall be furnished to the department and all parties.

The director shall issue a decision within 15 working days from the date the responses are filed. Request for review of a decision on the record shall be made pursuant to section 386-87, HRS.

(e) **Appeals process.**

- (1) A decision of the director shall be final and conclusive between the parties, except as provided in section 386-89, HRS, unless within twenty days after a copy has been sent to each party, either party appeals therefrom to the appellate board by filing a written notice of appeal with the appellate board or the department. In all cases of appeal filed with the department the appellate board shall be notified of the pendency thereof by the director. No compromise shall be effected in the appeal except in compliance with section 386-78.
- (2) The appellate board shall hold a full hearing de novo on the appeal.
- (3) The appellate board shall have power to review the findings of fact, conclusions of law and exercise of discretion by the director in hearing, determining or otherwise handling of any compensation case and may affirm, reverse or modify any compensation case upon review, or remand the case to the director for further proceedings and action.
- (4) In the absence of an appeal and within thirty days after mailing of a certified copy of the appellate board's decision or order, the appellate board may, upon the application of the director or any other party, or upon its own motion, reopen the matter and thereupon may take further evidence or may modify its findings, conclusions or decisions. The time to initiate judicial review shall run from the date of mailing of the further decision if the matter has been reopened. If the application for reopening is denied, the time to initiate judicial review shall run from the date of mailing of the denial decision. [Eff:5/13/05] (Auth: HRS §386-72) (Imp: HRS §§91-2(2), 386-86)

§12-10-73 Compensability denied or not accepted. (a) When an employer files a report of industrial injury, a copy of the report shall be concurrently furnished to the injured employee. When an employer denies compensability or indicates compensability is not accepted, the employer shall submit a written report to the director and the injured employee within thirty calendar days supporting the denial. Failure to submit a written report to support the denial shall indicate acceptance of the injury by the employer. The director may grant extensions for filing the employer's written report upon showing of good cause in writing.

(b) If upon review the director believes the injury should be accepted or is compensable, the director shall notify the employer and give the employer thirty calendar days to request a hearing. Should the employer fail to request a hearing, such action shall be considered a waiver of hearing and the director may issue a decision without hearing holding the injury compensable. The decision shall be final unless appealed pursuant to section 386-87, HRS.

(c) If upon review the director believes the denial of compensability is proper, the director shall notify the injured employee and give the injured employee an option to file a claim for industrial injury in accordance with chapter 386, HRS. [Eff: 11/29/85; am 12/8/94] (Auth: HRS §386-72) (Imp: HRS §§386-73, 386-86, 386-95)

§12-10-74 Consolidation of claims and joinder of parties. (a) The director may order the joinder of additional parties, except as provided in section 12-10-33, necessary for the full adjudication of a claim. Motions to join additional parties shall be made prior to the filing of a request of hearing. Upon showing good cause, the director may permit joinder of additional parties beyond the request of hearing date.

(b) The director may order the consolidation of claims necessary for the full adjudication of the injured employee's rights and each employer's liability for compensation. Motions to consolidate several claims shall be made prior to the filing of a request of hearing. Upon showing good cause, the director may permit consolidation of claims beyond the request of hearing date. [Eff: 11/29/85] (Auth: HRS §386-72) (Imp: HRS §386-86)

§12-10-75 Medical examination orders and reports. (a) Orders requiring the injured employee to appear for examination by the physician of the employer's choosing may be issued by the director.

(b) The employer shall submit a request in writing to the director and the injured employee twenty calendar days before the scheduled medical examination date. The request shall also include the purpose of the examination, justification for the order, the name of the physician, and time, date, and place of examination.

(c) The director, upon review of the case file and without necessity of hearing, and upon finding that the examination will assist in the expedient disposition of the case or in determining the need for or sufficiency of medical care or rehabilitation, shall issue a medical examination order. The order shall not be appealable and will inform the claimant that compensation may be suspended for failure to submit to the examination without good cause. The injured employee may be responsible for a reasonable no-show fee not to exceed \$250 charged by the physician.

(d) Reports for a medical examination by a physician chosen by the employer or employee not requiring a director's order shall be provided to all parties within fifteen calendar days after receipt and no later than fifteen calendar days prior to the scheduled date of hearing, whichever is sooner. Failure to provide the required copies may result in the director

denying inclusion of the report in the director's decision. [Eff: 11/29/85; am 12/8/94] (Auth: HRS §386-72) (Imp: HRS §§386-79, 386-95)

§12-10-76 Liability for expenses incurred by injured employee required to submit to a medical examination. (a) Whenever an injured employee is ordered or requested to be present for examination by a physician or surgeon selected by the employer, as provided under section 386-79, HRS, the employer shall pay the reasonable costs and expenses incurred for travel, transportation, room and board, and actual wages lost by the injured employee. An employee who is receiving temporary total disability benefits shall not be entitled to wage loss.

(b) Whenever an injured employee is ordered or requested to be present for an examination by a physician or surgeon selected by the director, as provided under section 386-80, HRS, the costs, expenses, and wages as specified in subsection (a) shall be paid to the injured employee from the funds appropriated by the legislature for the use of the department. [Eff: 11/29/85] (Auth: HRS §386-72) (Imp: HRS §§386-79, 386-80)

Historical Note

§12-10-76 is based substantially upon §12-13-5. [Eff: 8/13/71; am ren §12-13-5 1/1/81] (Auth: HRS §386-72) (Imp: HRS §§386-72, 386-79, 386-80)

§12-10-77 Filing of complaint. (a) Whenever a person has allegedly violated section 386-98, HRS, a written complaint, identifying the person charged and indicating the date and nature of the violation with related documentation, shall be filed with the director, provided that it is submitted within two years of the date of the alleged violation.

(b) The director shall send a copy of the complaint to the person against whom the complaint was filed and the person shall have thirty calendar days after the date the director sent the complaint by which to respond.

(c) The director or a duly appointed representative shall investigate the statements of the complainant and the person against whom the complaint has been filed and may, upon not less than twenty calendar days notice to the parties involved, hold a hearing pursuant to section 386-86, HRS. If the complaint is dismissed or no penalty is assessed, the director may issue a decision without a hearing.

(d) The decision of the director shall be sent to the respective parties in interest. If a violation of section 386-98, HRS, is found to have occurred, the director shall send a copy of the decision to the appropriate licensing boards.

(e) Requests for withdrawal of a complaint shall be submitted in writing. Upon receipt of this request, the director may dismiss the complaint and notify the person against whom the complaint has been filed.

(f) Any person aggrieved by a final decision of the director may file an appeal to the labor and industrial relations appeals board within twenty calendar days after a copy has been sent to each party. [Eff: 2/11/91; am 12/8/94] (Auth: HRS §386-72) (Imp: HRS §§386-94, 386-98)

§§12-10-78 to 12-10-90 (Reserved)

SUBCHAPTER 4

SECURITY FOR COMPENSATION

§12-10-91 Security for payment of workers' compensation benefits.

Every employer required to secure payment of workers' compensation benefits under section 386-121(a)(1), HRS, shall cover its entire liability to all of its employees under one insurance policy. [Eff: 4/30/81; am 1/9/89] (Auth: HRS §386-72) (Imp: HRS §91-2)

§12-10-92 Notice of insurance. (a) Every employer shall insure that each employee in its employ is informed if it is a self-insurer for purposes of chapter 386, HRS, or if insured, of the name of its workers' compensation insurance carrier and general agent, as applicable.

(b) Beginning on July 1, 1989, a notice of insurance on a form prescribed by the director shall be signed by an authorized representative of the insurance carrier and shall contain the following certification:

"This certifies that all employees of the named employer will be provided all benefits as required by the Hawaii Workers' Compensation Law." The notice of insurance shall be filed with the director within ten days from the effective date of the policy. [Eff: 4/30/81; am 1/9/89; am 2/11/91] (Auth: HRS §386-72) (Imp: HRS §§91-2, 386-122)

§12-10-93 Cancellation of workers' compensation insurance. (a) A notice of intention to cancel an insurance contract under the terms of section 386-127, HRS, shall be in writing, served either personally or by registered or certified mail, return receipt requested, upon the employer or its representative.

(b) Upon completion of service of notice of intention to cancel an insurance contract, the insurance carrier shall notify the director in writing of the date of the service and of the date of cancellation.

[Eff: /30/81] (Auth: HRS §386-72) (Imp: HRS §386-127)

§12-10-94 Self-insurance; application; duration; cancellation; revocation.

(a) **Application.**

- (1) An employer desiring to maintain security for payment of compensation under section 386-121(a)(3), HRS, shall file:
 - (A) An application with the director on a form provided for this purpose.
 - (B) The most current audited annual financial statement with an unqualified audit opinion for a period not more than one year of the date of the application.
 - (C) Audited annual financial statements for the previous three years conducted in accordance with generally accepted accounting and auditing principles.
 - (D) A copy of the resolution of the applicant corporation board of directors authorizing the filing of the application for a certificate of consent to self-insurance and execution of the instrument of undertaking in furnishing security if required.
 - (E) An actuarially determined annual workers' compensation future liabilities of the applicant, prepared by a Member of the American Academy of Actuaries or other qualified loss reserve specialist approved by the director.

- (2) Where an applicant for self-insurance is a subsidiary and the subsidiary cannot submit an independent current audited annual financial statement with an unqualified audit opinion, in lieu thereof an indemnity agreement approved as to form and content by the director shall be executed by the parent corporation of the subsidiary and submitted with its application.
- (3) The financial statements must demonstrate the applicant's financial solvency. To detect any unique or extraordinary circumstances facing the applicant, factors considered in financial analysis include, but are not limited to, operating income for the last five years, positive retained earnings, no adverse substantial statements in the notes to the financial statements, and a favorable Altman "Z" score. Furthermore, ratios derived from the applicant's financial statements must compare favorably to the industry averages. Ratios examined include, but are not limited to liquidity ratios, coverage ratios, leverage ratios, and operating ratios.
- (4) The ability to pay workers' compensation benefits means sufficient financial strength and stability to pay obligations as they mature; pay compensation benefits and all liabilities which are likely to be incurred under the Hawaii Workers' Compensation Law; and have sufficient cash or cash equivalents, security deposit, and excess insurance to make benefit and compensation payments as they come due. The ability to pay shall be established by the maintenance of a trust account by the applicant in the amount of the actuarially determined annual workers' compensation liabilities of the applicant.
- (5) Failing to demonstrate financial solvency, the applicant may still pursue self-insurance under section 386-121(a)(2) by providing a security deposit in an amount equal to the greater of \$1,000,000 or 1.5 times the actuarially determined annual workers' compensation future liability of the applicant. The security deposit may be a surety bond, government bond, letter of credit, or certificate of deposit acceptable by the director. All forms of security shall name the director as beneficiary. When a security deposit is required, the following criteria shall apply:
 - (A) The director shall accept a surety bond only from companies certified by the United States department of treasury as "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies," as published in the Federal Register.
 - (B) The security deposit must name the director as obligee and must be held by the director as security for payment of all workers' compensation liabilities. The director shall retain a security deposit until all liabilities have been paid. The director shall, at its discretion, convert the deposit needed to pay claims.
 - (C) A security deposit in the form of a surety bond or letter of credit must include a statement that the grantor of the security deposit is required to give to the principal, the director, 60 days notice of its intent to terminate future liability. The grantor of the security deposit is not relieved of liability for injuries occurring prior to the effective date of termination. A Letter of Credit must be issued by a state chartered bank or member of the Federal Reserve System.

- (6) Specific excess insurance is required of a self-insured employer. Aggregate excess insurance is required by the director for an employer unless substantive evidence is provided that it is not warranted. This evidence must include diversification of risk, industry type, financial resources, self-insured retention levels, policy limits of the specific excess policy, safety program, loss experience and other appropriate factors as determined relevant by the director. The contract or policy of specific excess insurance and aggregate excess insurance must comply with the following:
- (A) It is issued by a carrier licensed in Hawaii with a Best's Rating of A- or better and a financial size rating of VI or greater. Excess coverage issued by a carrier not rated by Best's will be considered for approval at the discretion of the director.
 - (B) It may be cancelled or its renewal denied only upon written notice by registered or certified mail to the other party to the policy and to the director not less than 60 days before termination by the party desiring to cancel or not renew the policy. A carrier is liable for payment of all claims that occur from the date of inception of the policy to the cancellation date of the policy.
 - (C) Any contract containing a commutation clause must provide that any commutation effected thereunder will not relieve the underwriter(s) of further liability in respect to claims and expenses unknown at the time of such commutation or in regard to any claim apparently closed at the time of initial commutation which is subsequently reopened by the director or a court. If the underwriter proposes to settle the liability as provided in the commutation clause of the policy for future compensation benefits payable for accidents occurring during the term of the policy by the payment of a lump sum to the self-insurer, then not less than 60 days prior notice to such commutation must be given by the underwriter(s) or agent(s); by registered or certified mail to the director. If any commutation is effected, the director shall have the right to direct such sum be placed in trust for payment of benefits of the injured employee(s) entitled to such future payments.
 - (D) If a self-insurer becomes insolvent and/or fails to make benefit payments, the excess carrier, after it has been determined the retention level has been reached on the excess insurance policy, shall make payments to the entity making payments on behalf of the insolvent self-insured in the same manner as payments would have been made by the excess carrier of the self-insured.
 - (E) All of the following will be applied toward the retention level in the excess insurance contract:
 - (i) payments made by the self-insurer;
 - (ii) payments made on behalf of the self-insurer from the proceeds of any security deposit as ordered by the department; and
 - (iii) payments made on behalf of the insolvent self-insurer by the Special Compensation Fund.

- (F) Copies of the certificates and policies of the excess insurance must be filed with the department for a determination that such certificates and policies are approved by the insurance commissioner.
- (7) An applicant must retain an adjustor licensed under chapter 431, HRS, to provide complete claims service to process and promptly pay claims in accordance with chapter 386, HRS.
- (8) Upon approval of the self-insurance status, an Order for Self-Insurance shall be issued to the applicant and this order must be conspicuously posted at the applicant's worksite.
- (b) **Duration.**
 - (1) Each self-insurance authorization shall be effective from date of issue to June 30 of each calendar year.
 - (2) The self-insurer is liable for the charges into the workers' compensation special compensation fund pursuant to section 386-154.
 - (3) Annual submission and review of self-insurer's audited financial statements are required for continuation of the self-insurer's self-insurance status. The most recent audited financial statement, prepared in accordance with generally accepted accounting and auditing principles, for a period ending not more than twelve months prior to June 30 of the current year, must be submitted on or before April 1 of each year.
- (c) **Cancellation.** A notice of intention to cancel self-insurance shall be submitted in writing to the director within at least thirty days prior to the effective date of cancellation. If a security deposit is required pursuant to section 12-10-94(a)(4) above, this security deposit must be maintained at least twenty four months after termination of self-insurance status, provided all workers' compensation claims occurring during the period of self-insurance and workers' compensation special compensation fund assessments pursuant to section 386-154, HRS have been paid.
- (d) **Revocation.** A self-insurance authorization may be revoked by the director upon notification in writing to the self-insurer, if the self-insurer fails to meet its obligation to pay workers' compensation benefits resulting from work injuries during the period of self-insurance or if the self-insurer fails to demonstrate financial solvency and ability to pay workers' compensation benefits. [Eff: 4/30/81; am 5/13/05] (Auth: HRS §386-72) (Imp: HRS §§91-2, 386-121)

§§12-10-95 to 12-10-99 (Reserved)

SUBCHAPTER 5

MEDICAL STABILIZATION

§12-10-100 Determination of medical stabilization. (a) Preliminary determination of an injured employee's medical stability shall be made by the director upon request as provided in section 12-10-101, based upon a review of medical records and reports and other relevant evidence. The director may request from any party any additional information or consult with health care experts as the director deems necessary to determine the medical stability and ability to return to work of an injured employee.

(b) The director shall issue a preliminary decision upon determining an injured employee's medical condition has stabilized and the employee is unable to return to the employee's regular job.

(c) Any employee who has effected a compromise pursuant to section 386-78, HRS, shall not be entitled to a preliminary decision.

(d) A preliminary decision shall not be made when compensability of the injury is an unresolved issue unless both parties petition the director for a preliminary decision.

(e) Any injured employee who has elected not to participate in a vocational rehabilitation program shall be issued a preliminary decision upon reaching medical stabilization, and unless the review of medical reports and other relevant evidence indicate otherwise, the employee shall be deemed able to resume the employee's regular job. [Eff: 11/29/85] (Auth: HRS §386-72)(Imp: HRS §386-31)

§12-10-101 Request for stability review and determination. (a) The employer shall notify the director and the injured employee when the employer receives information indicating the injured employee may be medically stable. The employer shall identify all such correspondence with capital letters "MEDICAL STABILIZATION", shall explain the reasons for arriving at the conclusion, and attach all relevant documentation.

(b) The director, in the absence of reports from the employer, may declare medical stabilization after a review of the documents in file. [Eff: 11/29/85] (Auth: HRS §386-72) (Imp: HRS §386-31)

§12-10-102 Mailing of preliminary decision. A preliminary decision shall be mailed to the injured employee and the employer or the insurer or the adjuster of the employer. Preliminary decisions shall also be mailed to the employee's and the employer's designated representative provided a letter of representation is on file with the department. Requests for preliminary decisions by other parties of interest shall be in writing and approved by the injured employee, employer, the respective designated representatives, or director for each preliminary decision. [Eff: 11/29/85] (Auth: HRS §386-72) (Imp: HRS §386-31)

§12-10-103 Requests for hearing. The preliminary decision shall be considered the final decision unless a request for hearing is filed with the director in writing not later than twenty calendar days after the date the preliminary decision is sent. The hearing shall be held in accordance with section 386-86, HRS, and the director shall issue a written decision based upon the evidence received. This decision shall be final unless appealed pursuant to section 386-87, HRS. [Eff: 11/29/85] (Auth: HRS §386-72)(Imp: HRS §§386-31, 386-86, 386-87)

§12-10-104 Vocational rehabilitation entitlements. (a) If the injured employee is medically stable and not permanently disabled, the injured

employee shall not be referred for additional vocational rehabilitation services but may be permitted by the director to complete an approved vocational rehabilitation plan.

(b) If the injured employee is medically stable and is or may be permanently disabled, the director shall decide if the injured employee is entitled to vocational rehabilitation services. [Eff: 11/29/85] (Auth: HRS §386-72) (Imp: HRS §§386-25, 386-31)